Supreme Court, U.S.
FILED

No. 011833 JUN 11 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CAVALRY INVESTMENTS, LLC
ASSIGNEE OF THE FIRST
NATIONAL BANK OF OMAHA
Respondent

v.

HERBERT M. VONDERHEIDE
Petitioner
Appearing Pro-Se

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

Herbert M. Vonderheide
Appellant, Pro-Se
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28pgs

QUESTIONS PRESENTED FOR REVIEW

In an Ohio debt collection action involving defaulted consumer debt, do Ohio courts have the discretion to rule relying on Ohio debt collection statutes which provide less protection than the federal statutes provided in denying a defendant / debtor relief who claimed the more protective federal statutes.

OPINIONS BELOW

There was an OPINION issued in this case.

The OPINION of the First Appellate District of Ohio, Hamilton County, from which certiorari is sought is hereby attached as Appendix A 1 - 5 presenting the salient portion of the OPINION relevant to the Question Presented.

A petition for review was filed in the Ohio Supreme Court and was denied on February 13, 2002 and attached as Appendix B-1. Request for reconsideration was filed in the Ohio Supreme Court and was denied on March 20, 2002 and attached as Appendix B - 2.

Entry of Hamilton County, Ohio, Common Please Court granting Respondent relief is attached as Appendix B - 3 - 4.

Release of jurisdiction by Hamilton County, Ohio, Municipal Court is attached as Appendix B - 5.

The jurisdiction of this court is invoked pursuant to 28 USC §1257 and - per Rule 29 4 (c) - 28 USC §2403 (b) may apply.

This statutes relevant to this petition are:

15 USC §1692a (4) and (6) cl. 1 attached as Appendix C - 1.

15 USC §1692n attached as Appendix C - 2.

Ohio Revised Code §1319.12 (A) attached as Appendix D - 1.

Ohio Revised Code §1319.12 (B) attached as Appendix D - 2.

Ohio Consumer Law §5.8 attached as Appendix E - 1.

Kimber v. Federal Financial Corp. 668 F.Supp 1480 (M.D. Ala. 1987) attached as Appendix E - 2.

Holmes v. Telecredit Service Corp. 736 F.Supp 1289 (D.Del. 1990) attached as Appendix E - 3.

STATEMENT OF THE CASE

The present case originated as a complaint for money in the Hamilton County Ohio Municipal Court (Doc. #00CV29274) filed on November 13, 2000.

The basis of the case is Respondent filed a complaint for money claimed of $6,118.00 on a defaulted, unsecured consumer credit card account owed by Petitioner. Respondent purchased Petitioner's defaulted account from Petitioner's original creditor. Petitioner answered and counterclaimed and sought damages. Hamilton County Municipal Court relinquished jurisdiction and case was transferred to Hamilton County Ohio Common Pleas Court which granted Respondent relief and entered judgement.

Petitioner filed appeal in the Ohio First Appellate District which upheld - in an opinion - Common Pleas Court judgement.

Petitioner filed for both consideration and reconsideration of jurisdiction in the Ohio Supreme Court and was denied.

REASONS FOR GRANTING THE WRIT

Petitioner pleaded the FAIR DEBT COLLECTION PRACTICES ACT (Appendix A - 2 emphasis added) in his answer. Per the FAIR DEBT COLLECTION PRACTICES ACT, the underlying debt is immaterial and the "debt collection agency" is barred from counterclaiming the fact of the debt.

In the sole ruling / opinion in this case, the First Appellate District of Ohio relied on Ohio Revised Code §1319.12 (A) (1) (Appendix D - 1), which lacks the "defaulted debt" provision which is contained in 15 USC §1692a (4) (Appendix C - 1) in denying Petitioner relief.

Petitioner claims Respondent is a "debt collector" (15 USC §1692a (6) (Appendix C - 1) and, per Ohio Revised Code §1319.12 (B) (Appendix D - 2), is required by Ohio law to have a place of business in Ohio.

The Ohio First Appellate District agrees with claim of Petitioner that the statute - Ohio Revised Code §1319.12 B - does require a "debt collection agency" to have a place of business in Ohio in order to commence collection activities (Appendix A - 2 emphasis added).

In Ohio Consumer Law (2000 Ed. Williams) (Appendix E - 1), section 5.8 cites two federal district court cases to clarify Ohio's definition of "debt collection agency"; Kimber v. Federal Financial Corp. (Appendix E -2), and Holmes v. Telecredit Service Corp. (Appendix E - 3). Petitioner pleaded Ohio Consumer Law §5.8 in both his original answer and the petition to the Ohio Supreme Court.

Per 15 USC §1692n of the FAIR DEBT COLLECTION PRACTICES ACT (Appendix C - 2), federal law pre-empts state law when the federal law affords more protection to the consumer.

The Ohio First Appellate District refused to apply the federal statute in in this case and relied on the less protective Ohio law (Appendix A - 4 emphasis added) which lacks the "defaulted debt" exception to the definition of "creditor" (15 USC §1692a (4) Appendix C - 1).

The Ohio courts have "violated" the Supremacy Clause of the United States Constitution (Article VI cl. 2) in that the Ohio courts relied on the "less protective" Ohio statute.

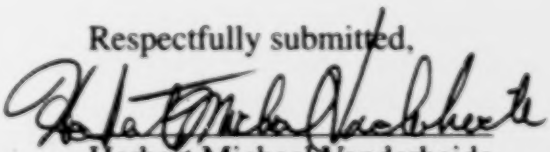
From the language in the First Appellate Court's Opinion, it appears that the court strained to rely on the "Assignment" aspect of the statute, clearly stating Respondent did not take an "assignment" but purchased the acount for its own portfolio, i.e. appearing before the court in the capacity of a "creditor". Joint compliance with both the federal and state statutes is impossible.

The United States Congress chose to "occupy the field" in passage of the FAIR DEBT COLLECTION PRACTICES ACT, thereby "pre-empting" the Ohio Revised Code regarding the definition of "debt collection agencies".

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's application for a Petition for Writ of Certiorari be granted.

Respectfully submitted,



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Appendix A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Calvary, Investments, L.L.C.)	APPEAL NO. C-010359
)	TRIAL NO. A-0100639
Plaintiff-Appellee,)	
)	
vs.)	*OPINION.*
)	PRESENTED TO THE
Herbert M. Vonderheide,)	CLERK OF COURTS
)	FOR FILING
Defendant-Appellant.)	NOV - 9 20001
)	COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgement Appealed From Is: Affirmed

Date of Judgement Entry on Appeal: November 9, 2001

Immerman & Tobin Co. L.P.A and Stuart Tobin, for Appellee,
Herbert M. Vonderheide, pro se.

OHIO FIRST DISTRICT COURT OF APPEALS

PAINTER, JUDGE.

This case presents a finite question of law: is a purchaser of debt, attempting to collect the debt in its own name, a collection agency as defined in R.C. 1319.12 (A)? If so, appellee Calvary, Investments, L.L.C., would have to comply with R.C. 1319.12 (B), which requires a collection agency that takes assignments of debt to have a place of business in Ohio. Evidently, Calvary has no office here. We hold that Calvary is not a collection agency, so it is not subject to R.C. 1319.12.

Calvary sued appellant Herbert M. Vonderheide, demanding $6,118 due on a credit-card account initially issued to Vonderheide by First National of Omaha, d/b/a First Bankcard Center ("First National"). Calvary had purchased the debt from First National after Vonderheide's default. Vonderheide counterclaimed, alleging that because Calvary was a collection agency under R.C. 1319.12, it was required to have a place of business in Ohio in order to collect the debt. He supported this allegation by maintaining that because Calvary met the definition of "debt collector" under the federal Fair Debt Collection Practices Act,[1] it must have been a collection agency under the Ohio statute. He also alleged that because Calvary claimed to be a creditor when it did not have a place of business in Ohio, it was guilty of misrepresentation and deceit in violation of the Federal Fair Debt Collection Act.[2]

Vonderheide also alleged that by asserting the position that it was a creditor, while contesting Vonderheide's allegation that it must have a place of business in Ohio under R.C.

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[1] See Section 1692 *et seq.*, Title 15, U.S. Code.

[2] See Section 1692 e(10), Title 16, U.S. Code (prohibiting the use of false representations or deceptive means in debt collection).

1319.12, Calvary had engaged in misrepresentations and deception in violation of the Federal Fair Debt Collection Act.

Calvary moved for judgement on the pleadings and dismissal of the counterclaims. Vonderheide moved for summary judgement on his counterclaims. The trial court overruled Vonderheide's motions and granted Calvary's motions.

On appeal, Vonderheide raises assignments of error. He claims that the trial court erred by failing: (1) to determine that Calvary was a debt collector or collection agency; (2) to rule on his allegation that Calvary must have a place of business in Ohio.

We begin our analysis by examining what the trial court ruled. It granted Calvary's motion for judgement on the pleadings with respect to its claim that Vonderheide owed Calvary $6,118. There was no dispute that Vonderheide owed the money.

Under Civ.R. 12(C), any party may move for judgement on the pleadings. In this case, Vonderheide, as the nonmoving party, was entitled to have all material allegations contained in the complaint, with all reasonable inferences that could be drawn from them, construed in his favor.[4] A Civ.R. 12 (C) motion presents only questions of law, and the trial court is restricted to the allegations in the pleadings in making its ruling.[5] We hold that no error attended the trial court's entry of judgement on the pleadings for the money owed by Vonderheide to Calvary.

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[4] See *Peterson v. Teodosia* (1973), 34 Ohio St.2d, 161, 165, 297 N.E.2d 113, 117.

[5] See *id.*at 166, 297 N.E.2d at 117.

The trial court also granted Calvary's motion to dismiss the counterclaims. For the court to have properly dismissed the counterclaims under Civ.R. 12(B) (6), it had to appear beyond doubt from the counterclaims that Vonderheide could prove no set of facts entitling him to relief.[6] Essentially, Vonderheide's counterclaims against Calvary involved his interpretation of "collection agency" under R.C. 1319.12. This raised a question of law.

There is no dispute that Calvary purchased Vonderheide's debt from First National. R.C. 1319.12(a) (1) defines a collection agency as "any person who, for compensation, contingent or otherwise, or for valuable consideration, offers services to collect an alleged debt asserted to be owed to another." The statue also contains a section regarding collection agencies that take assignments of debt to sue in their own names.[7] The plain language of the statue is that a purchaser of a debt does not fall under the R.C. 1319.12(A) (1) definition, because it is pursuing collection on its own behalf. We hold that, as a matter of law, Calvary is not a collection agency as defined by the statute.

As to Vonderheide's second assignment, because Calvary is not a collection agency, the statute's requirement for a collection agency to have a place of business in Ohio is inapplicable. We understand Vonderheide's confusion because the attorney who filed the complaint initially named the plaintiff as Calvary as an assignee of First BankCard. The pleadings indicate that the caption's designation of Calvary as an assignee was erroneous – it was a purchaser of the debt. Resultantly, we conclude that Vonderheide's allegation that Calvary's defense that it was not a debt collector under the statute fails to state a claim. We overrule Vonderheide's two assignments because the trial court was correct in granting Calvary's motion to dismiss.

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[6] See *O'Brien v. Univwesity Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753.

[7] R.C. 1319.12(B).

Judgement affirmed.

Hildebrandt, P.J., and **Winkler, J.**, concur.

Please Note:

The court has recorded its own entry on the date of the release of this Opinion.

Appendix B

The Supreme Court of Ohio

Calvary, Investments, L.L.C.	**RECEIVED FEB 16 2002**
Appellee,	FILED FEB 13 2002
vs.	MARCIA J. MENGEL, CLERK SUPREME COURT OF OHIO
Herbert M. Vonderheide,	CASE NO. 01-2035
Appellant.	ENTRY

Upon consideration of the judrisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Herbert M. Vonderheide.

(Hamilton County Court of Appeals; No. C010359)

"s/Thomas J. Moyer"
Thomas J. Moyer
Chief Justice

0007r021302

The Supreme Court of Ohio

Calvary, Investments, L.L.C.	**RECEIVED MAR 22 2002**
Appellee,	FILED MAR 20 2002
vs.	MARCIA J. MENGEL, CLERK SUPREME COURT OF OHIO
Herbert M. Vonderheide,	CASE NO. 01-2035
Appellant.	RECONSIDERATION ENTRY (Hamilton County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. C010359)

"s/Thomas J. Moyer"
Thomas J. Moyer
Chief Justice

0019r0322002

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

RECEIVED APR 25 2001

Calvary, Investments, L.L.C. Assignee of First National Bank of Omaha 7 Skyline Drive, Second Fl. Hawthorne, New York 10532	)	Case No. A0100639
	)	Judge Cartolano
Plaintiff	)	
vs.	)	JUDGEMENT ENTRY
Herbert M. Vonderheide a/k/a H. Michael Vonderheide 6918 Pinoak Drive Cincinnati, Ohio 45239	)	
Defendant	)	

This matter came to be heard on Defendant's Motion for Joinder, Defendant's Motion for Summary Judgement, Plaintiff's Motion for Judgement on the Pleadings and Plaintiff's Motion to Dismiss Counterclaims. The Court finds that Defendant's motions are not well taken and are denied. The Court finds that Plaintiff's motion are well taken and are granted.

IT IS HEREBY ORDERED that Defendant's Motion to Join First National Bank of Omaha, d/b/a/ First Bankcard Center as co-Plaintiff is overruled, that Defendant's Motion for summary Judgement is overruled, that Plaintiff's Motion to Dismiss Counterclaims is granted, and Plaintiff's Motion for Judgement on the Pleadings is granted and Plaintiff is awarded judgement against Defendant in the amount of $6,118.00 plus court costs and interest to run at the statutory rate from the date of judgement.

_____

Judge Cartolano

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

RECEIVED FEB 5 2001

Calvary, Investments, L.L.C.	)	Case No. A0100639
	)	
vs.	)	NOTICE OF TRANSFER
	)	
Herbert M. Vonderheide	)	

You are notified that the above entitled action has been transfered from Hamilton County Municipal Court to the Court of Common Pleas Hamilton County you are further notified that you shall have 28 days from the receipt of this notice to answer in this transfered action.

Date February 01 2001

James C. Cissell
Clerk of Common Please Court
Hamilton County, Ohio

Name and Address
Stuart Tobin
Ste 1010
632 Vine St.
Cincinnati, Ohio 45202

Sandra E. McGraw
Deputy Clerk

Appendix C

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose or which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

(Pub. L. 90-321, title VIII, § 803, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 875, and amended Pub. L. 99-361, July 9, 1986, 100 Stat. 768.)

§ 1692n. Relation to State Laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

(Pub. L. 90-321, title VIII, § 816, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 883.)

Appendix D

1319.12 Collection of assigned debts

(A) (1) As used in this section, "collection agency" means any person who, for compensation, contingent or otherwise, or for other valuable consideration, offers services to collect an alleged debt asserted to be owed to another.

(1999 H 18, eff. 10-20-99; 1997 S 67, eff. 6-4-97; 1996 S 180, eff. 9-17-96)

1319.12 Collection of assigned debts

(B) A collection agency with a place of business in this state may take assignments of another person's accounts, bills, or other evidences of indebtedness in its own name for the purpose of billing, collecting, or filing suit in its own name as the real party in interest.

(1999 H 18, eff. 10-20-99; 1997 S 67, eff. 6-4-97; 1996 S 180, eff. 9-17-96)

Appendix E

5.8 Coverage and definitions – Creditor

"Creditor" is defined for purposes of the FDCPA as "any person" who offers or extends credit creating a debt or to whom a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of debt in default solely for the purpose of facilitating collection of such debt for another."[76]

Generally, creditors are *not* subject to the Act.[77] There are, however, two exceptions. First, one who accepts assignment of a debt then in default, for the purpose of collecting the debt, is excluded from the definition or "creditor" and falls within the coverage of the FDCPA.[78] Thus, check guaranty agencies, which purchase dishonored checks from merchants and seek to collect them from consumers, are "debt collectors".[79] Second, a creditor who uses a name other than its own also falls within the coverage of the FDCPA. Whether a creditor has used a name other than its own depends on whether the name actually used is sufficiently identified with the name used by the creditor in conducting the underlying transaction, or is such as to convey the impression that a third party is involved in collection.

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[76] 15 U.S.C.A. § 1692a(4).

[77] Warren v. Bank of Marion, 618 F.Supp. 317 (W.D. Va. 1985). For example, the Sixth Circuit has held that American Express is not a debt collector. Lewis v. ACB Bus. Servs., Inc., 135 F. 3d 389, 411 (6th Cir. Ohio 1998).

[78] Kimber v. Federal Fin. Corp., 668 F.Supp.1480 (M.D. Ala. 1987); Cirkot v. Diversified Fin. Sys. Inc., 839 F.Supp. 941 (D Conn. 1993); Commercial Serv. of Perry, Inc. v. Fitzgerald, 856 P.2d 58 (Colo. App. 1993).

[79] Holmes v. Telecredit Serv. Corp., 736 F.Supp. 1289 (D. Del.1990); Kimber v. Federal Fin. Corp., 668 F.Supp. 1480 (M.D. Ala. 1987). The FDCPA's definitional language, "owed or due another," means *originally* owed or due another.

KIMBER v. FEDERAL FINANCIAL CORP.
cite as 668 F.Supp. 1480 (M.D. Ala. 1987)

1. Consumer Protection ⊙═ 10

Corporation formed for sole purpose of collecting on bankrupt company's accounts receivable was "debt collector," within meaning of Fair Debt Collection Practices Act, through it was collecting debts for itself, in that it regularly collected debts and debt collection was its principal purpose; moreover, debts collected were already in default when they were assigned to corporation and thus corporation fell within assignee exception to definition of creditor. Fair Debt Collection Practices Act, § 803 (4,6), as amended, 15 U.S.C.A. § 1692a (4,6).

2. Consumer Protection ⊶ 10

Computerized check authorization and purchase service, which regularly attempted to collect on dishonored checks purchased from its subscribers, was a "debt collector" within meaning of Fair Debt Collection Practices Act. Consumer Credit Protection Act, § 803(4,6), as amended, 15 U.S.C.A. § 1692a(4,6).

Supreme Court, U.S.
FILED
JUN 26 2002
CLERK

No. 01-1833

In The

Supreme Court of the United States

HERBERT M. VONDERHEIDE,

Petitioner,

v.

CAVALRY INVESTMENTS, LLC,
ASSIGNEE OF THE FIRST NATIONAL
BANK OF OMAHA,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pages

QUESTION PRESENTED

When a state statute definition of "Collection Agency" excludes a purchaser of delinquent debt, should a court completely rewrite the definition of "Collection Agency" in the state statute so as to include a debt buyer?

REASONS FOR DENYING THE PETITION

The claim of Respondent revolves around the state statutory definition of collection agency. Petitioner is trying to include a debt buyer to the term collection agency. His theory is that if Respondent is a collection agency and does not have a place of business in Ohio, there is a misrepresentation which therefore violates the Fair Debt Collection Practices Act. Respondent, as a debt collector, is subject to the Fair Debt Collection Practices Act. However, it is not a collection agency as defined in Ohio Revised Code §1319.12(A). That statute defines a collection agency as "Any person, who for compensation, contingent or otherwise, or for valuable consideration, offers services to collect an alleged debt asserted to be owed to another." That definition is clear and unambiguous. Respondent is not a collection agency. Thus there is non-Federal ground which adequately supports the judgment. It is of sufficient breadth to support the judgment and is not inconsistent with any Federal law. This is one reason why the Court should deny the Petition for Certiorari. *Jankovich v. Indiana Toll Road Co.*, 379 U.S. 487, 13 L. Ed. 2d 489, 85 S. Ct. 493 (1965).

The Fair Debt Collection Practices Act does not define the terms "Creditor" and "Debt Collector." Even if Respondent is a debt collector and creditor, Petitioner does not say how that magically turns respondent into a collection agency. Petitioner somehow wants the Court to completely rewrite the state statutory definition because Petitioner thinks it should be so. Petitioner is trying to find a violation of the Fair Debt Collection Practices Act when none exists. The lower court followed established principles of statutory construction. There is no case or controversy. The issue that Petitioner raises does not present a special

or important issue for review, so the Petition for Certiorari should be denied.

CONCLUSION

For the reasons states above, the Writ for Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

JUNE 2002